Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/10129/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 3 May 2019	**On 21 May 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

MRS FATIMA BIBI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M Azmi of Counsel, Kausers Solicitors
For the Respondent: Mr S Whitwell, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a national of Pakistan born on 5 November 1996. She first entered the United Kingdom on 25 December 2012 as the dependant of her mother, at which time she was 16 years of age. She subsequently made an in time application for leave to remain as the spouse of a British citizen on 21 December 2017, having undergone an Islamic marriage in February 2017.

2. This application was refused in a decision dated 13 April 2018, on the single basis that the Appellant did not meet the minimum income threshold of the financial

requirement of Appendix FM. The Appellant appealed against that decision and her appeal came before Judge Watson on 20 November 2018.

3. In a decision and reasons promulgated on 29 November 2018, the judge dismissed the appeal, finding that at the date of decision the specific requirements of Appendix FM-SE were not met in respect of the evidence of the Sponsor's employment; that there were no insurmountable obstacles to the Sponsor and Appellant relocating to Pakistan and that a fresh application could be made by the Appellant via entry clearance in order to return.

4. Permission to appeal was sought out of time on a number of bases. The two material grounds of challenge before me were:

   (1) Firstly, whether the judge erred in failing to apply the relevant jurisprudence *cf.* Chikwamba [2008] UKHL 40 and R (on the application of Chen) IJR [2015] UKUT 00189 IAC when assessing the proportionality of the decision pursuant to Article 8; and

   (2) secondly, whether the judge materially erred in failing to have regard to section 117B of the NIAA 2002.

5. In a decision dated 20 March 2019, First tier Tribunal Judge Swaney granted permission to appeal in *inter alia* the following terms:

> *"6. In assessing proportionality outside the Rules, the judge considered whether or not there were insurmountable obstacles to family life continuing outside the United Kingdom and found that there were not. This conclusion was reasonably open to the judge on the evidence before him.*
>
> *7. The judge gave reasons for not attaching weight to the fact the appellant satisfied the Rules as at the date of hearing. In doing so the judge gave significant weight to fair immigration control but failed to have regard to section 117B of the NIAA 2002. Section 117B is a mandatory consideration in assessing proportionality outside the Rules. On that basis it is arguable that the judge's assessment of proportionality was flawed.*
>
> *8. The grounds of appeal disclose an arguable error of law."*

6. Whilst Judge Swaney gave express permission only in respect of the failure to consider the statutory public interest considerations, it seemed to me that the arguments set out in the first ground of appeal were arguable and I informed the parties at the outset of the hearing that I wished to hear them in respect of that argument as well.

Hearing

7. On behalf of the Appellant, Mr Azmi submitted that the judge had failed to take account of a material consideration *viz* section 117B(2) and that the Appellant does speak English. At [21] the judge made reference to the Appellant requiring an

interpreter. There was in the bundle a certificate from Trinity College, in respect of which the Appellant obtained an ESOL certificate in English speaking and learning at level A1 and he submitted this was sufficient for the purposes of section 117B(2) of the NIAA 2002.

8. In respect of whether or not the Appellant was financially independent, it is clear that that requirement was met by the finding at [20] by Judge Watson that the payslips provided showed the Sponsor meets the required threshold for the last six months. In respect of section 117B(4), whilst the Appellant's leave has been precarious, it is material that she has been lawful within the UK throughout her stay since 2012 at the age of 16. However, in respect of the precarious element of section 117B(5) it is clear from the judgment in Rhuppiah [2018] UKSC 58 at [49] that there is a limited degree of flexibility when considering this aspect and the Appellant's positive immigration history is material in this respect, having arrived here as a child.

9. In respect of the second point, Mr Azmi sought to rely on the judgment of their lordships in Agyarko [2017] UKSC 11 at [51]. He submitted the Court was considering a situation where, even if an individual did not have any form of leave but was here lawfully, there was no public interest in the removal of that person following the judgment of their lordships in Chikwamba [2008] UKHL 40. He submitted that this was clearly applicable.

10. In relation to the evidence of employment, Mr Azmi took me to page 34 of the Appellant's bundle which was a letter for Ingeus dated 2 January 2018 stating that the Sponsor's employment had started on 6 November 2017 and that he had earned £17,000 excluding overtime. In relation to the wage slips these were at pages 35 to 45 and covered the period November 2017 to October 2018, which was a single wage slip contained at page 5 of the supplementary bundle.

11. Mr Azmi submitted that, having been given the opportunity to calculate the amount, the Appellant's overall income between November 2017 to October 2018 was £18,811.87. He therefore submitted the judge's finding at [20] that the Appellant meets the Rules is correct.

12. In his submissions, Mr Whitwell stated that whilst he accepted that there is no express reference to section 117B of the NIAA 2002, this is not fatal to the appeal because the statutory public interest considerations were applied in substance by the judge. Mr Whitwell sought to rely on the fact that at [20] the judge had stated:

> *"The appellant states she now meets the Rules and it would be disproportionate to make her apply again. I accept that looking at the wage slips provided from November 2017 to the date of hearing that the Sponsor has earned the required threshold over 6 months. This is also demonstrated by entries in the bank statements."*

13. Mr Whitwell submitted that the judge clearly implicitly found the Appellant met the financial requirement of Section 117B. He also sought to rely on the judge's finding at [22]:

> *"On the appellant's side of the scales is her claim that she would now meet the Rules if she made a fresh application. Is this enough to make it disproportionate to refuse her clearly deficient application made in December 2017? I find it is not. There is a strong public interest in firm but fair immigration control and the Rules apply to all those who wish to enter or remain in the UK. It would not be in the public interest to allow those who make a deficient application, which in this case was based on her need to make some sort of application before her leave expired on 24.12.2017 to jump the queue of all those who wish to remain. The integrity of the Rules is important. They can only be disapplied if strong reasons are shown and I have been shown none. The decision is proportionate."*

14. Mr Whitwell submitted that the judge was clearly here referring to the public interest and thus implicitly addressing section 117B(1), which had been applied in substance if not expressly. In respect of the requirement that the Appellant speak English, Mr Whitwell submitted that this is at best a neutral point following the judgment in Rhuppiah [2018] UKSC 58. In relation to the *Chikwamba* point, Mr Whitwell submitted that *R (ota Chen)* at [39] now represented the correct position, where it provides that the Rules need to be met and there then needs to be a disproportionate interference with family life due to the temporary separation. Mr Whitwell submitted this was because *Chen* was considered against the backdrop of the material change in the amendments to the Rules in 2014 and that the Secretary of State's policy had also changed, which was now that there needed to be insurmountable obstacles rather than a focus on queue jumping. He submitted that it is clear from [13] of the judge's decision and [21] that the Appellant was asked whether there were insurmountable obstacles and did not provide any, nor any reason as to why she would be unable to make a new application from Pakistan.

15. In relation to the financial requirement, Mr Whitwell submitted it was clear from Appendix FM-SE paragraph 2, A1, that the requirement is six months' worth of evidence and payslips prior to making the application and if there is a changed employer this needed to be twelve months. Thus, it was clear that that requirement was not met because the payslips now available were from November 2017 when the Sponsor started work at Ignius, which he had only done so seven weeks before the application. Thus he needed to have shown payslips for the previous twelve months at the date of application due to the change in employer.

16. Mr Whitwell submitted that the Appellant's evidence that the Sponsor relied on evidence of a second form of employment, which was "*off the books*", this employment was not accepted by the judge and this was a finding open to her on the evidence.

17. In response, Mr Azmi submitted that it was notable from the jurisprudence that the Appellants in those cases did not have leave or were overstayers, whereas this

Appellant's case was distinguishable because she had been lawfully resident in the United Kingdom since 2012.

18. I reserved my decision, which I now give with my reasons.

Findings and reasons

19. It is apparent and was not disputed by Mr Whitwell that the Judge failed to have regard to the statutory public interest considerations, set out at section 117B of the NIAA 2002. His argument was, however, that this was not material given that although no express reference was made to section 117B, the Judge considered the public interest considerations in substance as part of his overall findings e.g. at [20] and [22].

20. The difficulty with this argument is that it is simply not possible to tell that the Judge did have all the material public interest considerations set out within section 117B in his mind when assessing the proportionality of removal of the Appellant. I find that it is far from clear at [20] that the Judge took into account in the Appellant's favour that she met the requirements of section 117B(3), given that the Judge found simply that he accepted looking at the wage slips from November 2017 to the date of hearing that the Sponsor has earned over the required threshold over 6 months as was also demonstrated by entries in the bank statements. I find he was here clearly having regard to the requirements of the Immigration Rules rather than the statutory public interest considerations.

21. Similarly, in respect of the findings at [22], the Judge held as follows:

> "*On the appellant's side of the scales is her claim that she would now meet the Rules if she made a fresh application. Is this enough to make it disproportionate to refuse her clearly deficient application made in December 2017? I find it is not. There is a strong public interest in firm but fair immigration control and the Rules apply to all those who make a deficient application, which in this case was based on her need to make some sort of application before her leave expired on 24.4.17, to jump the queue of all of those who wish to remain. The integrity of the Rules is important and they can only be disapplied if strong reasons are shown and I have been shown none. The decision is proportionate.*"

22. I find that it is far from apparent that the Judge here had in mind anything other than the general public interest in maintaining immigration control. There is no reference in the decision and reasons either to whether the Appellant can speak English [s117B(2)] or the basis upon which she developed her private life in the United Kingdom [s117B(5)]. I find this last factor is particularly material, given the undisputed evidence that the Appellant has resided lawfully since her arrival in the United Kingdom at the age of 16 and that her admission was as a dependent on her mother in a category that led to settlement. This is clearly a material factor in considering the public interest and I find it could have made a material difference to the outcome of the appeal.

23. I further find that the Judge erred materially in law in failing to consider the *Chikwamba* line of jurisprudence, in light of his acceptance at [20] that the Sponsor had earned over the required threshold over 6 months and his finding at [22] that the Appellant would meet the requirements of the Rules if she were to make a fresh application. I find that this could have made a material difference to the outcome of the appeal.

24. I set the decision of First Tier Tribunal Judge Watson aside and re-make the decision.

25. In respect of the section 117B statutory public interest considerations, I find, in light of the fact that the Appellant produced at AB 16 a Grade 2 certificate in spoken English, level A1 with distinction dated 7 December 2017, that she speaks English and thus the requirements of section 117B (2) of the NIAA 2002 are met. In light of the Judge's finding, which is supported by the documentary evidence at AB 35-84 that the Sponsor earns sufficient funds to meet the financial requirement of E-LTRP 3.1.(a) of Appendix FM of the Immigration Rules, I find that the requirements of section 117B(3) is met. In respect of section 117B(5), I find that the fact that the Appellant entered the United Kingdom as a child dependent of her mother, in a category which leads to settlement, is material, bearing in mind the judgment of their Lordships in Rhuppiah [2018] UKSC 58 at [49]:

> *"But, as both parties agree, the effect of section 117A(2)(a) is clear. It recognises that the provisions of section 117B cannot put decision-makers in a strait-jacket which constrains them to determine claims under article 8 inconsistently with the article itself. Inbuilt into the concept of "little weight" itself is a small degree of flexibility; but it is in particular section 117A(2)(a) which provides the limited degree of flexibility recognised to be necessary in para 36 above. Although this court today defines a precarious immigration status for the purpose of section 117B(5) with a width from which most applicants who rely on their private life under article 8 will be unable to escape, section 117A(2)(a) necessarily enables their applications occasionally to succeed."*

26. The House of Lords judgment in Chikwamba [2008] UKHL 40 per Lord Brown at [44] established that:

> "… *only comparatively rarely, certainly in family cases involving children, should an article 8 appeal be dismissed on the basis that it would be proportionate and more appropriate for the appellant to apply for leave from abroad."*

27. Mr Whitwell argued that since the advent of the changes to the Immigration Rules and the coming into force of Appendix FM that the position had changed and that the judgment in *R (ota Chen)* IJR [2015] UKUT 00189 IAC now represents the correct position in law:

> *"39. In my judgement, if it is shown by an individual (the burden being upon him or her) that an application for entry clearance from abroad would be granted and that there would be significant interference with family life by temporary removal, the weight to be accorded to the formal requirement of obtaining entry clearance is reduced."*

28. However, the Applicant in *Chen* was in the United Kingdom on a temporary basis as a student; her leave expired well before she and her husband began their relationship; they were married in the full knowledge that the applicant did not have leave and that her immigration status was precarious [43]. I accept Mr Azmi's submission this Appellant's case is distinguishable from *Chen* in that this Appellant has at all times been residing lawfully in the United Kingdom, having been admitted as the dependent of her mother, who was present and settled and then obtained an extension of leave in the same category. Whilst at the time the Appellant made an in time application for further leave on the basis of her marriage, her husband and Sponsor had not been working for sufficiently long with the same employer to meet the requirements of Appendix FM SE, I find it was reasonable that they sought to make an in time application rather than wait, given that this would have meant that the Appellant became an overstayer.

29. I find, for the reasons set out above, that the public interest does not require the Appellant to leave the United Kingdom in order to return to Pakistan simply for the purpose of obtaining entry clearance to re-join her husband in the United Kingdom and that to require her to do so would be disproportionate.

Decision

30. The appeal is allowed on human rights grounds.

No anonymity direction is made.

Signed *Rebecca Chapman* Date 17 May 2019

Deputy Upper Tribunal Judge Chapman